

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-1180

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

Docket No.
75-1180

RICHARD HUSS and JEFFREY SMILOW,

Defendants-Appellants.
-----x

APPENDIX
VOL. 2

NATHAN LEWIN
Miller, Cassidy, Larroca & Lewin
2555 M St.
Washington, D.C.

DENNIS RAPPS
66 Court St.
Brooklyn, N.Y. 11201

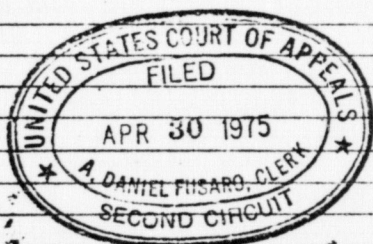
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Cont'd 73 Cr. Misc. (24/25)

DATE	PROCEEDINGS
	JEFFREY SMILOW
12-2-74	Filed True Copy of Order from USCA that the judgment of conviction of USDC are hereby confirmed.....Clerk JUDGMENT ENTERED, 12-6-74
3-27-75	Filed: Notice of motion for order providing Kosher Food for deft. Dated: 3-26-75 Filed: Notice of motion for Reduction of Sentence. Dated: 3-26-75.
4-10-75	Filed endorsed memorandum on Notice of Motion for reduction of sentence Filed 3-27-75--Motion denied. See transcript of 4-1-75. So ordered. GRISA, J.
4-10-75	Filed notice of appeal from the denial on 4-175, on deft's motion for reduction of sentence. (Mailed copies to Govt. & deft's atty.)
4-29-75	Filed transcript of proceedings dated April 1-1975.



A

367

73 Cr. Misc. (25)

DATE

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Filed : Notice of motion for reduction of sentence. Dated:3-26-75.

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4-10-75 Filed notice of appeal from the denial on 4-1-75, on deft's motion for reduction of sentence. (Mailed notices to Govt. & deft's atty.)

4-29-75 Filed transcript of proceedings dated April 1, 1975.

B

368

RAYMOND E. BURCHARDT, Clerk

By

Deputy Clerk

368

1 MCP

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----X
5 UNITED STATES OF AMERICA :

6 versus :

7 JEFFREY SMILOW and RICHARD HUSS, :

73 Cr 24

73 Cr 25

8 Defendants. :
9 -----X

10
11 New York, N. Y.

12 April 1, 1975 - 1:00 p.m.

13 Before

14 HON. THOMAS P. GRIESA,

15 District Judge.

16 APPEARANCES:

17 PAUL J. CURRAN, Esq.,

18 United States Attorney for the Southern District
of New York

19 ROBERT GOLD, Esq.,

Assistant United States Attorney

20 MILLER, CASSIDY, LARROCA & LEWIN, Esqs.,

21 2555 M Street, N. W., Washington, D. C. 20037
Attorneys for Defendants

22 NATHAN LEWIN, Esq., of Counsel

23 - - -
24
25

THE COURT: Now, the first motion which I have before me is a motion for reduction of sentence.

Mr. Lewin, do you have anything to say in addition to what is set forth in the papers, which I have carefully read?

MR. LEWIN: If I might just make two points --

THE COURT: In addition to your carefully written papers?

MR. LEWIN: The only points I would like to make in addition to the papers, your Honor, is to direct your Honor's attention to statements I believe your Honor made at the time of sentencing these defendants, and they appear, I think, at pages 148 and 149 of the transcript, in which I think your Honor stated that you recognize that the purpose of the sentencing in this case was not one of rehabilitation, because it was a unique situation, and it was unlikely that these defendants would ever be again subjected to the kind of situation that really caused, set in track the events that led to this charge and the trial in this court.

I believe your Honor noted at that time that the purpose, the sole purpose, of the sentence was to enforce the law and to vindicate the power of the Court, and it is in that regard that we brought to your Honor's attention the cases on criminal contempt, which we think involved pre-

cisely that policy, which is to vindicate the power of the Court, and we have found no case in which a sentence as substantial as the sentence in this case was sustained was reported in a Court of Appeals decision in criminal contempt situations, even, we submit, where the basis for the defendant's actions, the good faith or state of mind basis for the defendant's actions was far less justifiable and sometimes was far more contumacious than what the defendants did, I think, on even the worst view of the facts in this case.

That brings me to the second matter, which is related somewhat to that but on which I think again your Honor at the time of sentencing stated that you were not sentencing these defendants for anything having to do with the underlying offense alleged to have been committed in the trial or that it was an issue in the trial at which these defendants were to testify.

We submit that if that fact is really laid aside, and we think it should be, because although I note from the transcript of the last hearing on this issue before your Honor, when I was not present but Mr. Rapps was, that your Honor did make some mention of the fact that in your view these defendants were involved in some way in the commission of that offense -- that offense is plainly, we submit, not before your Honor in this case -- that with regard to that

offense in fact there has not been any proof submitted to this Court, and I think your Honor said that that has to be laid totally to one side.

We of course maintain that it is not a proper part of any sentencing to consider what happened in the Sol Hurok bombing in any way with regard to these particular defendant whose only offense that they are charged with in this court is that they wilfully refused to testify in the Federal trial before Judge Bauman, and on that record we submit they are far less culpable in terms of state of mind, in terms of the reason that they give for not having testified than the main defendants, who were defendants in the cases that appear in the footnote in the Chief Justice's opinion in Brown, which they cited, than the defendants for whom the Second Circuit reduced the sentence from a year to six months in the Levine case, and consequently we urge your Honor, given those considerations and given the factors that we have outlined in the papers which pertain to the defendants' youth, to their record -- let me just add on in that regard one item referred to in the papers but which we are afraid we did not have at hand at the time I submitted the papers, which is a statement from the City College of New York.

THE COURT: Include it in the affidavit.

MR. EWING: That letter from the Dean, from the

acting Dean of the City College indicated that Mr. Smilow, one of the defendants, is first in his class of fifty-four civil engineering students, based on his overall academic record at the present time, and I think this indicates that in many ways a sentence as long as the sentence that your Honor has imposed, which is one year, will not serve society will certainly not serve any rehabilitative purpose with regard to this defendant, and I think it will not serve the Court's ultimate function, which is to enforce the law and make sure that those who are under orders to testify or order to testify do testify.

These defendants have served nine weeks. Mr. Smilow has served nine weeks, and Mr. Huss served seven, and that in fact some part of the service of that sentence was, as matters turned out, unlawful.

Mr. Smilow's initial few weeks when he refused to testify before the grand jury -- it was ultimately determined only after the case went up to the Supreme Court of the United States that he had been the victim of unlawful wire-tapping, that in fact that order directing him to testify was invalid, and the sentence should be wiped off.

But there is no way that you give a man --

THE COURT: Do you suggest that that be credited to him?

1 MCP

2 MR. LEWIN: I think if it wasn't, it definitely
3 should be.

4 THE COURT: I assume these men will get credit for
5 any time served; is that right, Mr. Gold?

6 MR. GOLD: I would assume so, your Honor, but I
7 would like to be heard at length on everything Mr. Lewis
8 has stated to your Honor.

9 THE COURT: My sentence is a year, and it is up
10 to the prison authorities to determine what credit under
11 their normal procedures is appropriate. I will assume what
12 you are saying is correct, and that they will get credit for
13 time served. But that really is a matter for the Bureau of
14 Prisons, and I am sure you understand.

15 You may finish your presentation.

16 MR. GOLD: My understanding is that the nine weeks'
17 incarceration which Mr. Lewis is referring to was not in con-
18 junction with any sentence imposed by this Court for criminal
19 contempt but related solely to the time set by Judge
20 Bauman, stemming from his order of civil contempt, separate
21 and apart from the charge of which these defendants are now
22 convicted.

23 THE COURT: I think that should be the case. My
24 sentence is for a year, and it was the first time that there
25 was ever any criminal contempt conviction, and I think Mr.

1 MCP

2 Gold absolutely right, that the prior proceedings were
3 tempts by way of civil contempt to compel or persuade the d
4 fendants to do their duty, and that is, I am sure, complet
5 different, and I think the United States Attorney's office
6 should probably check with the Bureau of Prisons to see th
7 that is clarified so that no confusion arises, and you cou
8 notify Mr. Lewin, and I am sure they will --

9 MR. GOLD: Yes, your Honor.

10 THE COURT: The matter should be clarified so Mr
11 Lewin knows and the defendants know and the Bureau of Pris
12 knows, and if there is any necessity for any application on
13 that score, why, that can be done at a later time. But
14 we can proceed now with your motion.

15 Do you have anything else?

16 MR. LEWIN: No, your Honor. I would just want to
17 make a brief clarification for the record on that, your
18 Honor, that I think Mr. Gold is in error to state that all
19 that time was simply pursuant to the civil contempt. There
20 was a period of time after the trial had concluded --

21 THE COURT: That was not any eight or nine weeks.

22 MR. LEWIN: No.

23 THE COURT: That is something completely differen
24 a few days.

25 All right. This is all a matter for the Bureau of

Prisons.

MR. LEWIN: The reason I raised those first two weeks with regard to Mr. Smilow is because that is time served in prison under an illegal order, which turned out to be so because of a failing of the U. S. Attorney and was very critical.

THE COURT: Do you have any other points?

MR. LEWIN: No, your Honor. I just wanted to say with regard to that point, I think the defendant can be re-paid by the end -- be credited with it. The U. S. Attorney says those two weeks was a mistake, it was civil contempt; therefore we are not going to give him that time back.

THE COURT: Any other points?

MR. LEWIN: No.

THE COURT: Is there anything else that anyone wishes to present in favor of the motion to reduce sentence?

All right, Mr. Gold.

MR. GOLD: I want to try to be very brief.

As the Court knows, this has been personally distasteful for me, and, as Mr. Lewin knows, I decided not to submit an affidavit in court in opposition to this motion, but I told him that I would have some remarks to make.

I am troubled by several things that Mr. Lewin has seen fit to argue to the Court. The first is, on the one

2 hand, he suggests that the underlying case should be given
3 no consideration whatsoever by your Honor. At the same time
4 he submits an affidavit to this Court -- I am directing the
5 Court's attention to page 2 of the moving affidavit -- where
6 he suggests that the defendants were no more than mere wit-
7 nesses to his case.

8 He goes further and suggests that there is no evi-
9 dence before your Honor that they were anything more than
10 mere witnesses.

11 I think your Honor ought to consider the fact that
12 these defendants were witnesses and not named as defendants
13 because they were given immunity, and they were given immuni-
14 ty because the Government's position was that each of these
15 witnesses in Mr. Lewin's view, and each of these potential
16 defendants in the Government's view was an eye witness to a
17 case involving a crime which in Judge Bauman's view was
18 nothing less than a murder case.

19 It is the Government's position, and it is repre-
20 sented in the record at page 47 of the transcript, at which
21 point Mr. Jaffe, the assistant United States Attorney, was
22 putting questions to Mr. Huss, and the questions put to Mr.
23 Huss made clear the Government's position that Mr. Huss was
24 not only an eye witness to the bombing but in fact was one
25 of the individuals who brought the bomb to the particular

Sol Hurok office, where an ensuing explosion killed a young woman.

That is precisely, I submit to your Honor, what Judge Bauman focussed on when he repeatedly admonished these witnesses that this was not a possession of stolen mail case; this was one of the most aggravated and unusual cases he had ever seen outside of his term of law school or during his time on the bench.

THE COURT: Did any of the answers of Mr. Huss indicate that, or just the questions of Mr. Jaffe?

MR. GOLD: I am coming to that, your Honor. That is precisely the point.

Mr. Lewin now tells us there is no evidence in the record to suggest that they were more than mere witnesses. Your Honor, that fact is precisely the reason why we are in court today. There is no evidence in the record precisely, because these witnesses committed repeated contempts of court. That is precisely what precipitated the charge now pending before your Honor following conviction.

To suggest that there is no evidence on the ground that the Government indeed could produce none is sheer fallacy, and it is misleading, and I think the Court knows it as well.

Mr. Lewin talked about --

MR. LEWIN: Your Honor, I would like an opportunity to respond. Mr. Gold is charging me with being misleading. In that vein I hope I will have the opportunity to reply to that allegation.

THE COURT: Go ahead, Mr. Gold.

MR. GOLD: On the subject of vindicating the power of the Court, I find it utterly inconceivable for the Court to impose a sentence on the defendants in this case with a view to vindicating the power of the Court, totally without focussing on the crime which formed the basis of the case at which these defendants were ordered to testify. This is not a possession of stolen mail case. This is an aggravated case and a refusal to obey the order of the Court in a particular context.

In my judgment and in the judgment of the office I represent, that is precisely what makes the commission of a criminal contempt worthy of vindicating the power of the Court by imposition of sentence. That is exactly the position these defendants are in.

In line with that, your Honor, I would submit that in light of the fact that the co-defendants in that case faced a maximum sentence of more than forty years, a refusal by these two witnesses to testify, thereby terminating that case -- and the record may reflect that there are now papers

1 filed by Judge Werker articulating the reasons why the U. S.
2 Attorney's office has in the interests of justice decided
3 it had no other course but to seek leave to nolle that case,
4 because it no longer has any live testimony that it can
5 rely on.
6

7 I submit that in line with that, your Honor's
8 sentence of one year is an absolute, irreducible minimum,
9 reasonably calculated to vindicate the power of the Court.

10 I have nothing else to say at this time, your Honor.

11 THE COURT: Do you have a remark, Mr. Lewin?

12 MR. LEWIN: Yes, your Honor. Mr. Gold's statements
13 indicate that what he is trying to persuade the Court is to
14 sentence these men with the Hurok offense.

15 THE COURT: Let's not have any exaggeration. I have
16 read your affidavit. I know what it says, and it does not
17 say Mr. Gold makes a certain argument based on it. I have
18 looked at this just now, and I don't have to hear anything
19 further on this. I can even put my ruling on the record
20 that I am denying the motion for the reduction of sentence
21 for the following reasons:

22 The sentence as originally handed down was carefully
23 considered on the basis of all the circumstances, including
24 the matters now reviewed before me, and the reasons why I
25 imposed one year imprisonment still stand, and I find nothing

at all in the present submission which in any way indicates that the sentence should be reduced to any degree.

There is, of course, new information about the defendants presented now as far as their current activities are concerned, but all of those matters were basically considered at the time, that is, the facts about their academic careers and so forth, and the updating of the materials as far as their personal careers provide.

There is no basis for a change of the basic considerations that went into the original sentence.

I want to make it absolutely clear, and I don't want any confusion to be introduced into the record by Mr. Lewin or in any other way concerning my sentence at the time it was made, and my ruling now is not based upon the events which are spoken of by Mr. Lewin as the underlying events or underlying bombing crimes et cetera. I am not now ruling, and I did not then sentence these defendants for such crimes. That really goes without saying. Any sentence based on the types of crimes allegedly committed would be far more than a year, I am quite certain.

The year's sentence relates to the exact crime of which these defendants were convicted, that is, criminal contempt. However, Mr. Gold is quite right that the Court must consider the nature of the prosecution which these defendants

frustrated and prevented or helped to prevent, and that prosecution was of a very serious nature. It should have gone forward for the protection of society and for the enforcement of the law, and the prevention of that prosecution is a most serious matter and deserves a one-year sentence, to say the least.

And so I considered the nature of that prosecution which was not prosecuted. Whether that prosecution would have succeeded or not I don't know, but at least the Government should have been allowed to go forward with that law enforcement proceeding.

Now, as far as the culpability and the state of mind, before there was any criminal contempt proceeding brought, the matter had been to the Court of Appeals, and the Court of Appeals had made it perfectly clear that there was no valid ground, religious or otherwise, on which these defendants could refuse to testify. That decision came down. These defendants were apprised of it. They acted in total defiance of that decision. They are citizens of this country, and they acted defiantly and deliberately, in violation of their duties, known duties as citizens.

Now, what distresses me in this picture, among other things, is that there is almost a massive attempt to somehow shield these defendants from any recognition of their guilt.

At the time of the sentence, I received a veritable campaign of mail about them, urging leniency. I received dozens of letters bearing exactly the same language and, in many cases, on exactly the same form.

In connection with this motion, I am receiving, though nothing like the volume I received -- many letters containing the identical language.

I don't assume -- and that is of no great moment to me -- if criminal defendants and their families and their friends want to have mail sent to the Court and letters, they can be on form letters or any other way. It is perfectly okay. But here the sad fact to me is that this massive support, this tremendous amount of mail refusing to acknowledge the guilt of these defendants, to me represents a failure on the part of these people to acknowledge the laws of our country and to acknowledge the responsibility of these defendants and to acknowledge their guilt.

These defendants will have to live their lives. The best thing their families and friends and lawyers could do for them, the very best thing they could do for them, as in the case of anybody else who has done the wrong thing, is to make them face up to it. It is a cruel deception to hide from them or attempt to hide from them the fact of guilt. That is a disservice to them. I for one won't participate in

that, and if their families and friends really are thinking of their welfare, they will help them see what they have done wrong.

The campaign that has gone on to me is a distressing thing. It is a distressing thing for them. It is a distressing thing for our community, and I am utterly convinced that the motion for reduction of sentence has absolutely no merit, and it is denied.

Now we come to the question about the applications concerning kosher food, and I find in the first place that there are no affidavits from Mr. Huss or Mr. Smilow stating on personal knowledge the bona fides of their actual observance of regulations relating to dietary laws.

MR. LEWIN: We have the defendants in court today. I was planning to have Mr. Smilow take the stand and state his views, and if the Court would like to hear from Mr. Huss -- as I think I indicated in the papers, Mr. Smilow is in terms of observance of kosher requirements more strict in his personal observances than Mr. Huss.

THE COURT: I would not even consider any applications unless I hear from each of them personally. I have no affidavits.

MR. LEWIN: Our purpose in asking for the hearing today is to present evidence to your Honor live today from

UNITED STATES OF AMERICA,

Plaintiff,

- against -

JEFFREY SMILOW and RICHARD HUSS,

Defendants.

-x

:
:
: 73 Cr. 24/73 Cr. 25
:
:

MOTION FOR REDUCTION
OF SENTENCE

Defendants Jeffrey Smilow and Richard Huss respectfully move this Court for an Order reducing the sentence previously imposed on them, on July 31, 1974, upon this Court's finding that they were in criminal contempt of court for refusing to testify under grants of immunity at the trial of United States v. Stuart Cohen and Sheldon Davis (72 Cr. 778).

The grounds of this motion, as more fully set forth in the attached affidavit of Nathan Lewin, the exhibits thereto and the memorandum in support, are: first, that the rehabilitative and punitive purposes of the sentence could be fully carried out by a substantially shorter term of incarceration; second, that the defendants have shown, by their conduct since the time of sentencing, that they are able to make an affirmative contribution to society in their particular fields of endeavor, and third, that in

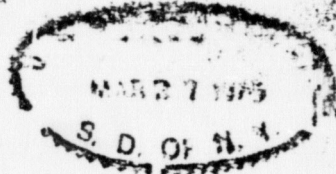
UNITED STATES OF AMERICA,

Plaintiff,

- against -

JEFFREY SMILOW and RICHARD HUSS,

Defendants.



MISC. MISC.
73 Cr. 24/73 Cr. 25 7PG

NOTICE OF MOTION FOR
REDUCTION OF SENTENCE

SIRS:

PLEASE TAKE NOTICE, on the annexed motion and exhibits, the undersigned will move this Court before the Hon. Thomas P. Griesa on April 1, 1975, at 1:00 p.m., or as soon thereafter as counsel can be heard, for an Order, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, for a reduction of the sentences formerly imposed upon said defendants on July 31, 1974, all for reasons more fully set forth in the annexed motion and memorandum in support.

Dated: March 26, 1975

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Nathan Lewin".

Nathan Lewin
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W.,
Washington, D.C. 20037
(202) 293-6400

TO: Paul J. Curran, Esq.,
United States Attorney for the
Southern District of New York

386

UNITED STATES OF AMERICA,

Plaintiff,

- against -

JEFFREY SMILOW and RICHARD HUSS,

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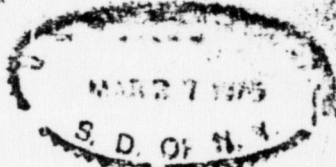
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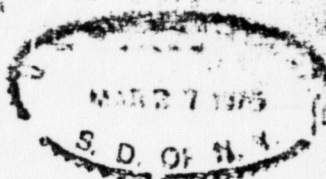
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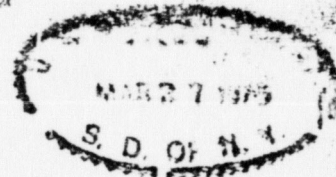
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73 Cr. 24/73 Cr. 25

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The grounds of this motion, as more fully set forth in the attached affidavit of Nathan Lewin, the exhibits thereto and the memorandum in support, are: first, that the rehabilitative and punitive purposes of the sentence could be fully carried out by a substantially shorter term of incarceration; second, that the defendants have shown, by their conduct since the time of sentencing, that they are able to make an affirmative contribution to society in their particular fields of endeavor, and third, that in

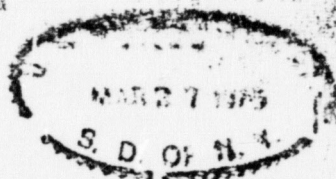
UNITED STATES OF AMERICA,

Plaintiff,

- against -

JEFFREY SMILOW and RICHARD HUSS,

Defendants.



MISC. MISC
73 Cr.24/73 Cr. 25 7PG

NOTICE OF MOTION FOR
REDUCTION OF SENTENCE

SIRS:

PLEASE TAKE NOTICE, on the annexed motion and exhibits, the undersigned will move this Court before the Hon. Thomas P. Griesa on April 1, 1975, at 1:00 p.m., or as soon thereafter as counsel can be heard, for an Order, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, for a reduction of the sentences formerly imposed upon said defendants on July 31, 1974, all for reasons more fully set forth in the annexed motion and memorandum in support.

Dated: March 26, 1975

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Nathan Lewin".

Nathan Lewin
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W.,
Washington, D.C. 20037
(202) 293-6400

TO: Paul J. Curran, Esq.,
United States Attorney for the
Southern District of New York

386

Defendants.

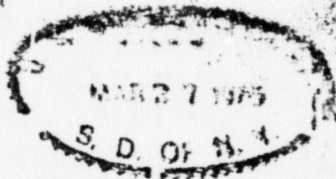
UNITED STATES OF AMERICA,

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- against -

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Defendants.



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386

UNITED STATES OF AMERICA,

Plaintiff,

- against -

JEFFREY SMILOW and RICHARD HUSS,

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MOTION FOR REDUCTION
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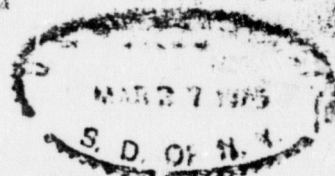
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- against -

JEFFREY SMILOW and RICHARD HUSS,

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Washington, D.C. 20037
(202) 293-6400

TO: Paul J. Curran, Esq.,
United States Attorney for the
Southern District of New York

386

1
2 them as well as from the rabbis.

3 THE COURT: You might have saved a little time by
4 presenting affidavits.

5 MR. LEWIN: I have no problem with that. I just
6 want --

7 THE COURT: Let's have the testimony quickly, then.

8 MR. LEWIN: All right. Mr. Smilow, will you take
9 the stand.

SMIL

10 J E F F R E Y S M I L O W , having first duly
11 affirmed, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. LEWIN:

14 Q Mr. Smilow, would you please state your religious
15 education?

16 A When I started school, in the first grade, I went to
17 a yeshiva, a Jewish school. I went in a yeshiva to eighth
18 grade. For high school, I went also to a Jewish high school,
19 a yeshiva, too, until twelfth grade. In that school, in the
20 morning you learned religious subjects. In the afternoon
21 you learned English.

22 Q Could you state, Mr. Smilow, what your personal
23 religious observances are? I won't characterize it. How
24 would you characterize it?

25 A My personal religious observance -- my home is

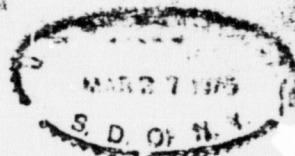
UNITED STATES OF AMERICA,

Plaintiff,

- against -

JEFFREY SMILOW and RICHARD HUSS,

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MISC. MISC.
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(202) 293-6400

TO: Paul J. Curran, Esq.,
United States Attorney for the
Southern District of New York

386

UNITED STATES OF AMERICA,

Plaintiff,

- against -

JEFFREY SMILOW and RICHARD HUSS,

Defendants.

73 Cr. 24, 73 Cr. 25

MOTION FOR REDUCTION
OF SENTENCE

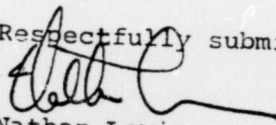
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light of the defendants' basis for their refusal to
testify - a religiously motivated claim - and their
youth at the time of the incidents in question, an extended
incarceration would not further the ends of justice.

Dated: March 26, 1975

Respectfully submitted,



Nathan Lewin
MILLER, CASSIDY, LARROCA & LEWIN,
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

- against -

JEFFREY SMILOW and RICHARD HUSS,

Defendants.

73 Cr. 24/73 Cr. 25

AFFIDAVIT IN SUPPORT
OF MOTION FOR
REDUCTION OF SENTENCE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

NATHAN LEWIN, being duly sworn, deposes and says:

1. I am an attorney-at-law, admitted to practice in the United States District Court for the District of Columbia and in the courts of New York State. I am a partner in the law firm of Miller, Cassidy, Larroca & Lewin, having offices at 2555 M Street, N.W., Washington, D.C. 20037. I represent Messrs. Huss and Smilow, defendants herein, and make this affidavit in support of their joint motion for reduction of sentence.
2. On July 16, 1974, defendants were convicted on charges of criminal contempt after a two-hour trial before this Court and a jury. On July 31, 1974, this Court sentenced the defendants to a period of one year's incarceration.
3. The history of this case is well known to this Court. Richard Huss and Jeffrey Smilow are young men who were believed by the prosecution to have evidence relevant

to the bomb explosion that occurred on January 26, 1972
at the offices of Sol Hurok in New York City. At that time
they were respectively 17 and 18 years old. Neither
defendant in this action was charged as a conspirator or
participant in the federal indictment which named four
individuals as having committed that offense.

4. Defendants Huss and Smilow were called as
witnesses in the federal trial growing out of the Hurok
bombing after one of the defendants in that case - whom
the prosecution had once viewed as a cooperative informer -
refused to testify. Both Huss and Smilow refused to
testify, even after a grant of immunity, on various grounds -
the one repeated most often being that it would violate
their religious principles to provide testimony in that
instance.

5. Both defendants were then found to be in civil
contempt of Judge Bauman, the trial judge in the Hurok
bombing case. During the pendency of their appeal from said
civil contempt orders - during which time the Hurok bombing
case was recessed - Huss and Smilow were confined to jail.
Upon completion of the appeal procedure and the resumption
of the Hurok bombing trial, Huss and Smilow were again
called to testify.

6. When both defendants again refused to testify - at
which time other substantial legal issues in addition to
their religiously motivated claims were raised - Judge Bauman
signed orders to show cause which formally charged Huss and

Smilow with criminal contempt pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure.

7. On July 16, 1974, trial was had before this Court. Defendants were found guilty and sentenced to one year's imprisonment.

8. Defendants Huss and Smilow are currently 20 and 21 years old respectively. They are, as reflected in the appended letters to Court, respected and active members in their respective communities. Defendant Smilow is currently completing his third year in a civil engineering program at the City University of New York (CUNY) where he has an exemplary academic record. Defendant Huss is on leave from Staten Island Community College because of the uncertainty of his future. During this period he is employed at his family's furniture store in Staten Island.

9. By their present activities and pursuits as well as from the assertions of those who have petitioned the Court on their behalf (see letters appended hereto), it is clear that both defendants are able to make substantial affirmative contributions to society through their chosen areas of endeavor. To interrupt their programs at this point, for even a short period of time, may frustrate that very progress they have made since their offenses of more than one year ago. Clearly, the ends of justice - i.e. the rehabilitative and punitive purposes of sentence - would be fully carried out by a substantial reduction in the terms of their incarceration.

10. During the pendency of their appeal from their citation by Judge Bauman for civil contempt, both defendants

were imprisoned for a period of nine weeks, at which time they experienced the punitive effects of the prison experience. Aside from the religious difficulties attendant to such incarceration in terms of the unavailability of kosher food and difficulties in properly observing the Jewish Sabbath and holidays, that short disruption interfered with each defendant's personal and religious growth and advancement.

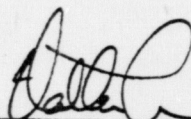
11. Retribution for the defendants' acts will not be mitigated in any way by a lessening of their sentence, since the mark of imprisonment will remain on them and with them regardless of their date of release.

12. Particularly in light of the fact the defendants' acts were motivated by a profound religious belief and practice, rather than out of disrespect for this Court, and in view of the youth of the defendants at the time of those acts, it would appear that a substantially lesser sentence than presently imposed would be in order.

13. A primary goal of incarceration is the prevention of recurrent criminal behavior. Frequently the fear and apprehension of an anticipated prison sentence is adequate to deter a defendant from returning to criminal conduct. The period of fear and apprehension for the defendants and their families has been long. During the period of these proceedings, the defendants have maintained a clear record and have had no further encounters with the law. It is therefore apparent that incarceration in this case is not required to cause the defendants to conform their

conduct to the law.

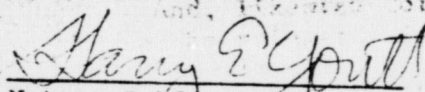
14. For all the foregoing reasons, together with the letters to this Court appended hereto, it is respectfully requested that this Court enter an order pursuant to Rule 35 of F.R. Crim. substantially reducing defendants Huss' and Smilow's sentences, or in the alternative that those sentences be suspended and they be placed on probation by this Court.



NATHAN LEWIN

Subscribed and sworn to before

me this 26th day of March, 1975



Notary Public

HARRY E. YOUTT

NOTARY PUBLIC, State of New York
No. 31-4519311

Qualified in New York County

Commission Expires March 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -X
UNITED STATES OF AMERICA,
Plaintiff,
-against- 73 Cr. 24/73 Cr. 25
JEFFREY SMILOW and RICHARD HUSS,
Defendants.
----- -X

MEMORANDUM IN SUPPORT OF MOTION
FOR REDUCTION OF SENTENCE

The instant motion is brought pursuant to Rule 35 Federal Rules of Criminal Procedure. It does not challenge the legality of the sentence imposed. Rather, it petitions this Court to exercise its inherent power to re-evaluate the sentence previously imposed upon the defendants in this case, in light of all the facts and circumstances now before it, and enter an order reducing that sentence or placing the defendants on probation.

This Court has sentenced each defendant to a one-year prison term. Counsel for defendants respectfully requests that this Court give substantial consideration to the following factors, and to the reported cases involving criminal contempt, and based upon them, that it reduce the sentences previously imposed.

Defendants are young men, 20 and 21 years of age, who, but for the incident involved in this case, have been leading a responsible life as children, students and community members. Each defendant has an excellent

reputation in his local community. Such a background is unlike that of the usual convicted criminals sentenced to prison terms. For purposes of this motion, that contrast is significant for several reasons.

First, it reveals that unlike those for whom a prison sentence would be appropriate, defendants Huss and Smilow have the positive backing of their families, their religion and their communities upon which to rely for rehabilitative support. Such stability is always considered a strong positive factor in predicting the success of terms of probation.

Second, this contrast relates also to the relative severity of the sentence imposed. To other convicted felons, confinement means that they are not free to go where they please or do what they want. The duration of a sentence therefore becomes important. For defendants Huss and Smilow, on the other hand, confinement for any period means disgrace within those very supportive bodies (family, community and church) which now stand to facilitate their rehabilitation. The same sanction applies whether the sentence is one year long or one month long; the added time only removes from society a useful and contributive member thereof.

Third, prison communities tend to be populated predominantly with those who have the more typical felon profile. A person of either defendant's background stands apart. As a consequence, daily life in prison, without the social support of fellow inmates, is rendered more

difficult and hence is a relatively harsher form of punishment.

In assessing the suitability of a one-year term, this Court should take two other concerns into account:

First, this Court must consider that the defendants were not prompted in their conduct by any motive of personal gain. The religious ground for their refusal to testify - which they personally emphasized time and again at the apparent expense of the more legally substantial claim of unconstitutional surveillance (even to the point where the latter were deemed waived by the Court of Appeals), has been brought to this Court's attention many times. The Court has indicated, however, that it also views these defendants as implicated in the incident that caused a death at the offices of Sol Hurok and Columbia Management. There is, of course, no showing that these defendants were involved in any way other than as witnesses to deeds that others committed. Even if there were, however, such proof would not rebut the fact that no personal gain of any kind has been sought by these defendants. If anything they did was misguided and unlawful - and they now recognize it was - they did it out of a strong feeling for their people and for the survival of their brethren around the world. The law's majesty must be recognized and enforced, but Draconian measures may not be the suitable means on this occasion.

Second, this is not a case of criminal contempt involving "deliberate violation unattended by mitigating circumstances." United States v. Levine, 238 F.2d 272, 274 (2d Cir. 1961). In the Levine case, the Second Circuit cited with approval the listing of criminal contempt sentences in the late Chief Justice Warren's dissenting opinion in Brown v. United States, 359 U.S. 41, 58 n. 11 (1959). In that enumeration, the refusals to testify "during the course of trial" (viewed as most severe by the late Chief Justice) were punished with sentences of 8 months (and a \$750 fine); 90 days and a \$1,000 fine; 6 months; and 30 days. The opinion observed that the only sentence as extreme as one year had been reversed. Ibid.

In the Levine case itself, the mitigating circumstances (fear of reprisal) justified the appellate court's reduction of the sentence from one year to six months. The defendants in this case present at least as good a case for "mitigating circumstances" as did Levine. We do not emphasize it, but there is in this record some suggestion of possible reprisals, and the defendants' sincerity of religious convictions and the absence of any possible personal gain - as well as the defendants' youth - point up the extraordinary severity of a one-year term.

Finally, we note the contribution that defendant Smilow is able to make to society if he is permitted to continue his studies. He has devoted himself entirely to serious advancement in his chosen field of professional

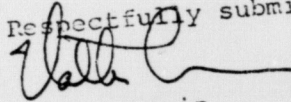
endeavor, and the attestation from the dean of his school shows how successfully he has performed. All these factors make this a strong case for reduction of sentence.

CONCLUSION

For the foregoing reasons, this Court should exercise its authority under Rule 35 of the Federal Rules of Criminal Procedure to reduce the sentence of the defendants.

Dated: March 26, 1975

Respectfully submitted,


Nathan Lewin
MILLER, CASSIDY, LARROCA & LE
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----X
4 UNITED STATES OF AMERICA, :

5 -against- :

6 JEFFREY SMILOW and RICHARD HUSS, :

7 Defendants. :

8 -----X

9 March 6, 1975
10 4:35 p.m.

11 BEFORE:

HON. THOMAS P. GRIESA,

12 District Judge

13
14 APPEARANCES:

15 PAUL J. CURRAN, ESQ.
16 United States Attorney for the
Southern District of New York
17 BY: ROBERT GOLD, ESQ.,
Assistant United States Attorney

18 DENNIS RAPPS, ESQ.
19 Attorney for defendants.
20
21
22
23
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25

1 rgl

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2 (Case called.)

3 THE COURT: What do we have on the Huss and
4 Smilow?

5 MR. RAPPS: Your Honor, this is an application
6 for an order that Mr. Huss and Mr. Smilow be permitted to
7 have kosher food during the period of their incarceration,
8 including the provision of food acceptable during the period
9 of Passover, which has special dietary needs.

10 THE COURT: Would you describe to me what that
11 means?

12 MR. RAPPS: The first part or the second part?

13 THE COURT: I want to know the details of what
14 the requirements are for Passover and what the requirements
15 are after that.

16 MR. RAPPS: Your Honor, during the period of
17 Passover that these requirements would pertain would be for a
18 period of eight and a half days. This would mean that there
19 are certain foods that could be eaten. Those foods would be
20 limited to those not having any content containing leavening.

21 THE COURT: Wait a minute, what is the period of
22 Passover?

23 MR. RAPPS: The period of Passover is from March
24 20th until April 3rd.

25 THE COURT: I am not clear. You say there can

1 rght

2 be no foods having leavening?

3 MR. RAPPS: Yes, your Honor.

4 THE COURT: What would that mean; regular
5 bread would not be included?

6 MR. RAPPS: Bread, cakes. The ingredients
7 that would be prescribed are not limited to bread, pertaining
8 to bread. There are certain other foods.

9 For example, as I say, cakes, certain types of
10 candied fruits and certain types of vegetables.

11 THE COURT: How is the prison going to accom-
12 plish this; do you have ideas on that?

13 MR. RAPPS: I understand that there has been
14 some discussion about it and extension of the time after --

15 THE COURT: What's your understanding about
16 that, you are not applying for that?

17 MR. RAPPS: I had not intended to apply for
18 that.

19 THE COURT: I had a telephone call at noon from
20 the Congressman from the district and I believe he called Mr.
21 Curran, but you are the lawyer on the case and after all the
22 Congressman, I am sure, trusts the lawyer on the case to make
23 the necessary applications.

24 MR. RAPPS: Your Honor, I just want to say for
25 the record I was not aware of the initiation of the phone call.

1 rgt

4

2 THE COURT: How were the calls initiated?

3 MR. RAPPS: I understand someone from the
4 family --

5 THE COURT: Who from the family?

6 MR. RAPPS: I am not aware of that, your Honor.
7 I just don't know. I know that I was called by somebody from
8 the Congressman's office saying that the calls were made and
9 to see if some consideration --

10 THE COURT: Do the defendants know how the
11 calls from the Congressman initiated?

12 MR. RAPPS: They are in the courtroom, your
13 Honor.

14 THE COURT: What is your application?

15 MR. RAPPS: Let me phrase my application. We
16 are primarily concerned with the provision of food that is in
17 accord with the orthodox Jewish requirements for the defen-
18 dants.

19 THE COURT: Have you got any suggestions about
20 how a prison is going to carry out this request? And I
21 will say right now, that I cannot require something of the
22 prison that is impractical.

23 Now, you suggest how these requirements are
24 going to be carried out.

25 MR. RAPPS: I might suggest that on the one
hand, that the prisoners might possibly be placed in an

1 rgl

2 institution where the food would be readily available from
3 the outside.

4 THE COURT: What is such an institution?

5 MR. RAPPS: I understand this has been done on
6 prior occasions in the West Street facility.

7 THE COURT: Where have they been placed?

8 MR. RAPPS: At this point I think Mr. Gold has
9 indicated that he is not aware of where they would be placed.

10 THE COURT: If you come in with an application
11 you have to support the application. You are coming in and
12 dumping this problem on me and there are ways that you can find
13 out what can be done.

14 MR. RAPPS: Well, your Honor, I had requested
15 information from Mr. Gold as to where they would be placed.

16 THE COURT: Is anything preventing you from
17 calling the warden of a prison? Have you tried to do that?

18 MR. RAPPS: My understanding is that this was
19 attempted on prior occasions at the West Street facility with
20 one of the defendants and that was unavailing and as a matter
21 of fact --

22 THE COURT: Who did it? Who made the call?

23 MR. RAPPS: There was a gentleman named -- I
24 believe -- this all happened so quickly, but I believe his
25 name is Rothenberg. He is somebody who is very interested in

1 rglit

2 this problem.

3 THE COURT: What interest does he have?

4 MR. RAPPS: He is working on some compilation
5 of instances where these things have occurred.

6 THE COURT: Who is Mr. Rothenberg?

7 MR. RAPPS: He has no additional capacity.

8 THE COURT: Does he represent the defendants?

9 MR. RAPPS: At that time I don't believe so.

10 THE COURT: Has any representative of the
11 defendants called any prison authority to find out how the
12 dietary matter can be taken care of?

13 MR. RAPPS: Not to my knowledge, your Honor.

14 THE COURT: You haven't even tried?

15 MR. RAPPS: Well, your Honor, I was brought
16 into this not more than thirty-six hours ago.

17 THE COURT: You were brought into it to take
18 care of the dietary matter?

19 MR. RAPPS: To deal with this problem in light
20 of the fact they have represented to me that they have had a
21 problem in the past during the prior periods of their incar-
22 ceration and as a matter of fact your Honor issued an order in
23 July of '74 as I understand, dealing with this problem, but
24 that was not dispositive of the issue that has been represented
25 to me.

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What we were simply interested in, your Honor, is some direction from the Court that all reasonable means would be undertaken to secure and to provide for the defendants' dietary needs in light of their -- which I believe their right of free exercise of religion under the First Amendment --

THE COURT: Look, I don't mean to be giving you a hard time, which I probably am, but I must say that I just can't help but observe that there is a tremendous effort to take care of the dietary problems of these two men and it is a little bit ironic in view of the crimes which they participated in.

They are all supposed to take great care about the dietary laws, but some woman was killed as a result of the activities of these two young men.

MR. RAPPS: Well, your Honor --

THE COURT: And that, I think, is just a moral matter which they should hear and you should hear, as everybody else who wants to hear it can hear. Do you understand that?

MR. RAPPS: Yes, your Honor.

THE COURT: I want to -- no matter what anybody has done, I want them to be able to observe their religion and I am going to do what I can to take care of that, but there is

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strenuous effort -- I appreciated the call from the Congressman this noon, but I must say that I think for somebody in the family to be even calling a Congressman, it is an exaggerated step.

Once the Congressman is called he obviously wants to do his duty by the constituents, and that's fine, but we have courts that pretty much take care of these matters and I assume you are somewhat embarrassed by that, and that's okay.

Now, I told the Congressman on the phone that I have no objection to having the surrender date delayed until after the completion of Passover. Is it Passover?

MR. RAPPS: Yes, your Honor.

THE COURT: During Passover there are special restrictions which don't apply at other times and the sentence -- the surrender date has been delayed so long now that it certainly is of no significance to have it delayed another month.

So when is Passover completed?

MR. RAPPS: Sundown, April 3rd.

THE COURT: So the surrender will be -- what do you say, Mr. Gold?

MR. GOLD: Your Honor, lest there be any confusion I would like to clear this up on the record.

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Mr. Rapps advised me prior to your hearing this application that apparently there was a misunderstanding about the U.S. Attorney's office's position with respect to the adjournment of the surrender date. Mr. Rapps is apparently under the impression that the U.S. Attorney's office did not and does not oppose that application. That is not the case.

I was present in Mr. Curran's office this morning and his instructions to me and his instructions to the Congressman were that as a matter of course we would oppose this adjournment as much as the mandate issued forthwith from the Second Circuit on February 21, 1973, in what I regard to be an excess of consideration given the facts of this case --

THE COURT: An excess of consideration by whom?

MR. GOLD: By the U.S. Attorney's office. I did not notice them for the usual surrender in one week or two days, but noticed them for surrender on March 10th, which is slightly more than three and a half weeks, which in and of itself is more consideration than is extended to the average defendant who has to surrender in Room 506 following conviction.

Now, if your Honor, in the exercise of discretion, is inclined to move the surrender date back until April 3rd, I would oppose that for the reasons stated, but I

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2 wanted the record to be especially clear that that is not a
3 matter in which the U.S. Attorney's office acquiesces at this
4 point.

5 THE COURT: When I talked to the Congressman
6 I told him that I would extend it because to me it has no
7 particular significance. I ordered these people remanded
8 last July.

9 MR. GOLD: Yes, sir.

10 THE COURT: And they got a stay from the Court
11 of Appeals, although there really wasn't any real applicable
12 question. The matter was affirmed from the bench as I under-
13 stand it.

14 MR. GOLD: By summary order, yes, sir.

15 THE COURT: My view is I just want to avoid
16 complications and I don't think if we now rush to incarcerate
17 these people during their Passover, we just will be involved
18 in more of what we are involved in today, which is groups of
19 people suddenly becoming aroused about this problem, which I
20 think we don't need that.

21 Now, I will then required your surrender on
22 April 5th, which gives plenty of time -- no, April 4th. They
23 will have to surrender April 4th and that may have to be at
24 an institution out of the state. They will either surrender
25 here at the other location at a time on April 4th which I

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2 will discuss.

3 You still have the dietary problem even after
4 Passover, but that's a little simpler, is it not?

5 MR. RAPPS: Yes, your Honor.

6 THE COURT: What are the dietary requirements?

7 MR. RAPPS: May I digress for one moment? I
8 don't have a calendar. April 3rd, I don't know what day of
9 the week that is.

10 THE COURT: April 3rd is a Thursday and April
11 4th is a Friday.

12 MR. RAPPS: And the 4th is Friday. I don't
13 know the procedure as to how when somebody surrenders --

14 THE COURT: I am thinking of having the surre
15 der at Ashland, Kentucky.

16 MR. RAPPS: I think that would be physically
17 impossible, your Honor.

18 THE COURT: It's up to them. I will permit t
19 surrender at the institution I think they will go to, but if
20 they don't want to surrender there, they can surrender at Wo
21 Street.

22 MR. RAPPS: I have no conceptual problem with
23 that.

24 MR. GOLD: I am not privy to the information
25 that your Honor is privy to. It was my understanding they

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would not be incarcerated together, but if your Honor understands they will be incarcerated in Ashland, Kentucky --

THE COURT: Mrs. March checked with the probation department and apparently before they were either on the way to Ashland or scheduled to go to Ashland, but you indicated that they would not want to surrender in Ashland, right?

DEFENDANT SMILOW: You see, Passover is on --

MR. RAPPS: Would you like to hear from them, your Honor?

THE COURT: Sure.

(Pause.)

MR. RAPPS: I think, your Honor, Mr. Smilow has indicated from his experience it takes some time for the surrender to be accomplished and Friday -- there is a limit on Friday in terms of the onset of the Sabbath, so that if -- I hesitate to ask that it be on Monday in light of your Honor's graciousness, but I think that all the problems would be resolved if he were to be able to surrender either on Sunday or Monday. I suppose --

THE COURT: You are going to be in prison on Sabbaths all through the year.

DEFENDANT SMILOW: But there is always complications downstairs in this place and by the time they get me

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2 to the place it may take the whole day and I may get there
3 late in the evening.

4 THE COURT: I think I confused things. I was
5 under the impression that one of you, when I ordered you
6 remanded before, you had arrived at Ashland, am I mistaken?

7 / DEFENDANT SMILOW: One of us got to Ashland, the
8 other didn't.

9 THE COURT: You are Mr. --?

10 DEFENDANT SMILOW: Smilow.

11 THE COURT: Who got to Ashland?

12 DEFENDANT HUSS: I did.

13 THE COURT: Why don't you come up, Mr. Huss.

14 Then the stay of the Court of Appeals occurred,
15 right?

16 DEFENDANT HUSS: Yes, sir.

17 THE COURT: Where were you at the time the Court
18 of Appeals granted the stay, Mr. Smilow?

19 DEFENDANT SMILOW: I was in Petersburg,
20 Virginia.

21 THE COURT: Okay.

22 DEFENDANT SMILOW: On the way to Ashland.

23 THE COURT: Oh, you were on the way to Ashland?

24 DEFENDANT SMILOW: Yes, it takes a long time.

25 THE COURT: I think -- you see, there is a pro-
vision which is being used now where people can surrender

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directly to the institution where they would be held and that is sometimes desirable for a number of reasons instead of surrendering at a local jail and then having the transfer problem and it is particularly helpful where there isn't any federal detention center and where all there is locally is a city jail.

Here we do have a detention center. I thought that if it was reasonably certain that they would both be going to Ashland, I thought that we might simplify the dietary problem by having them surrender directly to Ashland. They might have a little easier facilities than West Street, but again I think we are just turning handsprings over this and I probably am going too far.

I think what I will do is to delay the surrender until April 4th, but I think that the surrender should be in the courthouse at 10 a.m., April 4th, and we will let the prison authorities make the necessary movements.

Now, let's go back to the question of the dietary laws that will pertain after Passover. Can you explain that to me?

MR. RAPPS: Yes, your Honor. During the year the general requirements are, as a general matter, that the food be of a kosher variety; that they not contain unkosher elements or ingredients. Now, generally raw fruit, salad --

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these are acceptable. However, the problem that's arisen as in the past, as I understand it, is that these foods were available in limited quantity, but meats were not available, meats that were either -- meats known as kosher, which are those that have undergone ritual slaughter, and animals that have been secured -- animals that have been ritually slaughtered and also from animals that are of a kosher variety.

For example, pig meat is unacceptable, however slaughtered. Meat from a cow is acceptable, only if the cow had been ritually slaughtered. This is generally available in large metropolitan areas with, I suppose, large Jewish populations.

Now, the arrangements that have been made in the past, as I understand it, is that pre-packaged foods have been made available to certain prisoners, but only on a very irregular basis, if at all, and what we would suggest is that -- I don't know whether this is feasible, but if they would be made available on a regular basis, that the prison authorities would be required to make a comparable diet available to these prisoners on a regular basis and --

THE COURT: Where has this been done?

MR. RAPPS: I understand on occasion it has been done in the West Street center.

THE COURT: It is probably easier in New York.

MR. RAPPS: I think so.

THE COURT: The information I was able to get, and again, I wish you had made more of an inquiry, but the information I was able to get indicated to me that what has to be done is that the people -- they just cannot have two sets of food and what has to be done is if a particular meat is not acceptable to someone of a religious faith, they just have to refrain from that meat and eat more of other things. That is about as good a thing as I can come up with. It is not my information that at most of these institutions they can have special foods and there is no way I can require them to and there is no constitutional religious right to have special foods and they really have to select what they can eat out of the things that are available to them.

That may mean foregoing certain of the meat dishes.

MR. RAPPS: Your Honor, that's precisely the point. These defendant have been sentenced to one year and what would be involved is not eating meat for a full year.

THE COURT: There is certainly fish available. There is poultry. They can eat fish and poultry, can they not?

MR. RAPPS: That's the problem. Poultry also has to be slaughtered in a certain way and certain fishes are not permitted, certain fish that have certain characteristics

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2 are not permitted. It is a very involved procedure, I
3 admit, your Honor, but also the problem of the cooking. You
4 see, now, potatoes, for example, while there is no prohibi-
5 tion in the Jewish religious law about eating potatoes, but
6 potatoes that were cooked in pots that had previously con-
7 tained, for cooking purposes, meat that was unkosher, they
8 would not be permitted to eat those potatoes either or any
9 cooked in those utensils. It is a very involved procedure
10 and it appears that we are not trotting out all these things
11 to make a point, but this is really the fact of life and what

12 THE COURT: I don't think you are trotting
13 anything out, but I think -- now, what have orthodox Jews done
14 in the past when they have been in these institutions? How
15 did they get along?

16 MR. RAPPS: I think it presented a major prob-
17 lem. When they weren't able to make arrangements with a
18 friendly guard or a friendly person in the prison kitchen, they
19 had to do without many things and I can't say personally that
20 I know of people who have suffered -- their health have
21 suffered, but I would imagine that must have been the case.
22 I mean, we are living in 1975 and as your Honor has demon-
23 strated, there is much more sensitivity to people's needs
24 at this point, even those convicted of very serious crimes,
25 but I would only refer your Honor to the case of Barnett v.

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2 Rodgers in which the Circuit Court -- the District Court of
3 Colombia Circuit Court in a case involving the dietary
4 requirements of black Muslims -- I understand they are
5 also unable to eat meat containing any pork product -- that
6 the Court said -- set up the test that their dietary needs,
7 which are based on religion, could not be unmet unless there
8 was a compelling state interest to the contrary.

9 THE COURT: What's the law in this Circuit?

10 MR. RAPPS: I don't believe, and Mr. Gold can
11 correct me, I don't believe there is any case in point in this
12 Circuit.

13 THE COURT: Mrs. March has read that case, and
14 obviously knowing has been briefed before me and I wouldn't
15 expect it, but I am informed that the case holds that the
16 prison authorities cannot infringe upon religious beliefs
17 of the black Muslims in connection with food, except in the
18 case of a compelling state interest and they held that the
19 administrative necessities of the prisons were a compelling
20 state interest and if we are wrong on our memory of the case,
21 why, you certainly correct me, but that is as much information
22 as I have on a quick basis.

23 MR. RAPPS: It's been so long since I read the
24 case, but that wasn't my point. My point in raising it is that
25 is precisely what your Honor was leading to, what precisely

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2 could be done in order to provide for these needs and it
3 seems to me that the provision of T.V. Dinners, or something,
4 which I agree with might be out of the ordinary, but I think
5 is administratively possible, especially in an area like New
6 York.

7 THE COURT: I think you have to to think of
8 this. There are prisoners there that aren't getting T.V.
9 Dinners and I am not sure if it would be very seemly for two
10 young men to be singled out to get food of a different quality
11 which I think it would be, than the other people there, and
12 that's a problem.

13 So I think we better work along -- I think I
14 can delay the sentence, because I don't see any reason to have
15 any undue complications during the Passover because of this and
16 I gather without knowing a lot about it that there are very
17 strict requirements during Passover and so that's really not
18 a matter of great consequence to hold off sentence -- surrender
19 until April 4th. After that I really can't -- on the basis of
20 what I know now I can't really issue any special requirement
21 to the prison authorities.

22 In the first place, I don't have any materials
23 before me in the way of any legal authorities. Secondly, I
24 don't have any research or inquiry by you as to what can or
25 cannot be done. My own very quick inquiry this afternoon

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2 indicates that it would be difficult to make special provi-
3 sion, if not impossible, so I really don't have a basis now
4 on this kind of speculative presentation which you have made
5 and I don't say that critically, at all, but it is just a fact
6 I have to deal with.

7 I don't have any basis for entering an order.
8 Indeed, I rescind my prior order because I think that that
9 was done quickly and it was done without an appreciation of
10 the problem and I don't -- I rescind it simply because I don't
11 know now how it can be put into effect. So I am not going to
12 issue an order or hold in effect an order which I don't have
13 any idea of how it can be practically made effective.

14 So, my order of July 31, 1974 is rescinded.
15 You are free, if you feel strongly enough about this, if be-
16 tween now and April 4th you want to come back to me with an
17 application which is based on some inquiry and some -- where
18 you can help me in figuring out something practical I
19 will be happy to hear you, but that's the best I can do.

20 MR. RAPPES: Your Honor, may I just state that I
21 appreciate that your Honor has just ruled, but I would simply
22 like to state for your information that this has been done on
23 a number of occasions at the West Street facility. In fact,
24 there is one prisoner, I believe his name is Stuart Cohen,
25 who received this kind of meal in the West Street facility

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2 for approximately five and a half months.

3 THE COURT: These men will not be at the West
4 Street facility the whole year. That's the thing. I certainly
5 hope they are not. They ought not be at West Street for the
6 year. I don't think the Bureau of Prisons would dream of
7 keeping them there a year.

8 MR. RAPPS: I must confess ignorance as to the
9 procedure, but I must say it is physically feasible --

10 THE COURT: You are talking about West Street?
11 Now, let's -- I will tell you, you came in here in a hurry and
12 you are at perfect liberty to call the Bureau of Prisons to
13 try to find out where these people will be and find out what
14 facilities they have, or anything else you want to do.

15 Now, I would suggest to you -- you sort of keep
16 it in balance and you not, you know, create too much work about
17 this, but if this is a matter of importance to you and your
18 clients, why, something can be done beyond what's been done
19 here, but I believe I have no basis for ordering prison
20 authorities to do something at some location that I don't know
21 the men will be at and I don't have the faintest idea of what
22 facilities they have for cooking or obtaining these special
23 foods.

24 I cannot enter an order. I cannot keep the order
25 in effect that I made on July 31, 1974. We have gotten to the

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2 point of repeating ourselves, but that's where we stand.

3 MR. RAPPS: Your Honor, I just simply would
4 state that, as I said before, it was our position from the
5 outset that under the First Amendment that the prisoners would
6 be entitled to -- under the free exercise clause, would be
7 entitled to an accommodation to their religious needs.

8 THE COURT: The best information I have is from
9 my law clerk, who seems to have an accurate memory of the one
10 case that's been specifically mentioned here, and it does not
11 hold your way.

12 Now, if you have any other cases you can state
13 them.

14 MR. RAPPS: I think it was a factual --

15 THE COURT: Look, you are at liberty. If you
16 want to go into this further, you can come in and I don't think
17 we can really go any further on this.

18 MR. RAPPS: Thank you, your Honor.

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